IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 1, 2021

IN RE JACKSON H.

Appeal from the Juvenile Court for Giles County
No. 18-JV-690 Robert C. Richardson, Judge

No. M2020-01551-COA-R3-PT

J. STEVEN STAFFORD, P.J., W.S., dissenting in part.

Because I conclude that no clear and convincing evidence was presented to support any ground for termination of Father's parental rights, I respectfully dissent.

My dissent in this case is limited. I fully agree with the Majority Opinion's decision to reject DCS's effort to append various documents to its brief in an attempt to correct its failure to submit this proof to the crucible of trial. *Cf.* ***State v. Brock***, 327 S.W.3d 645, 698 (Tenn. Crim. App. 2009) (noting in the criminal context that "the reliability of the evidence gathered by the police is tested in the crucible of a trial at which the defendant receives due process"). As the Majority Opinion notes, the bulk of these documents were filed in the criminal proceedings well in advance of the termination trial.[1] DCS had every opportunity to present this proof at trial, but chose instead to rely on a party-prepared order that recited a variety of evidence that was never submitted for consideration.

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[1] The most recent attachment is a December 3, 2020 order, entered a few months after the termination trial. DCS has not requested that this Court take judicial notice of this order under our authority to consider post-judgment facts. *But see* Tenn. R. App. 14(a) (allowing this Court to take judicial notice of facts on our own motion). In any event, this order merely states that Father's sentencing hearing will take place in June 2021, well after the conclusion of the termination hearing in this case. Thus, this order, considered in isolation, does not establish what Father was convicted of or what his sentence on those charges is. Moreover, this Court has previously rejected attempts to present similar evidence under the guise of being post-judgment facts, holding that the evidence presented was "outside the scope of Rule 14." *See* ***In re R.L.***, No. M2017-02404-COA-R3-JV, 2018 WL 6331726, at *4 (Tenn. Ct. App. Dec. 4, 2018) ("While this Court acknowledges that stepfather's criminal conduct may be readily ascertainable and not subject to dispute, the conclusion to be drawn from it most assuredly is. The post-judgment facts presented by father go directly to the disputed issue of whether or not [the father committed the acts alleged]. The post-judgment facts father attempts to present, which were not heard by the trial court, cannot be characterized as 'unrelated to the merits,' and are thus outside the scope of Rule 14."). Thus, a variety of issues lead me to reject this "evidence."

I also agree that because of the final order's reliance on evidence not in the record, the grounds of persistence of conditions and failure to manifest a willingness and ability to presently assume custody or financial responsibility of the child were not proven. While it was undisputed at trial that Father was currently incarcerated, without some actual proof beyond his invocation of his Fifth Amendment Privilege giving us an indication of the length of Father's stay in prison, it is difficult to meet the required quantum of proof as to these grounds. *See, e.g.*, ***In re Scarlet W.***, No. W2020-00999-COA-R3-PT, 2021 WL 144232, at *5 (Tenn. Ct. App. Jan. 15, 2021) (noting that incarceration serves as a basis for termination only under statutorily prescribed circumstances); ***In re Kendall M.***, No. E2017-01769-COA-R3-PT, 2018 WL 2411831, at *9 (Tenn. Ct. App. May 29, 2018) ("Incarceration alone [ ] is not a ground for termination of parental rights[.]"); ***In re Ke'Andre C.***, No. M2017-01361-COA-R3-PT, 2018 WL 587966, at *9 (Tenn. Ct. App. Jan. 29, 2018) ("Although [f]ather's incarceration is a serious variable to be considered in the context of several of the grounds alleged for the termination of his parental rights, it cannot stand alone as a de facto bar to [f]ather's right to parent."); ***In re K.F.R.T.***, 493 S.W.3d 55, 62 (Tenn. Ct. App. 2016) (Swiney, J., concurring and dissenting) ("Incarceration alone is not, except where statutorily prescribed, a ground for termination of parental rights."); ***In re Johnathan F.***, No. E2014-01181-COA-R3-PT, 2015 WL 739638, at *13 (Tenn. Ct. App. Feb. 20, 2015) ("Caution by the courts is appropriate here to avoid making incarceration solely on its own into a de facto ground for termination.").

Where I must depart from the majority, however, is in its treatment of the ground of abandonment by wanton disregard. As the Majority Opinion correctly points out, wanton disregard is most often characterized as requiring evidence along the lines of "probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child," which "can, alone or in combination" prove this ground for termination. ***In re Audrey S.***, 182 S.W.3d 838, 868 (Tenn. Ct. App. 2005). We have also held that unless the conduct was particularly egregious and directly threatened the child's safety, more than one type of bad conduct is generally required to prove wanton disregard. ***In re Johnathan M.***, 591 S.W.3d 546, 557 (Tenn. Ct. App. 2019), *perm. app. denied* (Tenn. Apr. 2, 2019).

Here, the window of time for proving wanton disregard prior to incarceration is extremely limited. *See* Tenn. Code Ann. § 36-1-102(1)(A)(iv) (requiring that the conduct amounting to wanton disregard occur "prior to incarceration"). It appears that the child was only approximately two months old when Father was incarcerated. Father's wanton disregard must therefore have been exhibited in this time period.[2] Due to this brief window,

[2] Wanton disregard can also occur when a child is in utero, provided that the parent is aware of the child's existence. ***In re Anthony R.***, No. M2014-01753-COA-R3-PT, 2015 WL 3611244, at *3 (Tenn. Ct. App. June 9, 2015) ("In our opinion, while the statutory reference to 'the child' can mean a child *in utero,* the wanton disregard language of Tenn. Code Ann. § 36-1-102(1)(A)(iv) must be construed to require that the father has knowledge of the child at the time his actions constituting wanton disregard are taken."). I am not aware of any proof in this case that Father was aware of the child's existence prior to

the Majority Opinion chooses to focus on a single instance of bad conduct allegedly committed by Father: the alleged incident where he dangled the child by his feet in order to compel Mother to commit criminal activity. This conduct, if proven, is arguably egregious and certainly a direct threat to the child's safety. *See* ***In re Johnathan***, 591 S.W.3d at 557. The problem, however, is that there was no evidence that this incident actually occurred.

The only support for this allegation of bad conduct cited in the Majority Opinion is testimony from family service worker Savannah Boshers that a dependency and neglect petition was filed alleging that Father threatened to drop the child if the mother did not engage in criminal conduct. In my view, however, this was not competent evidence that the conduct actually occurred. For one, Ms. Boshers was merely reciting the allegations that had been made in a dependency and neglect petition. Allegations in a petition are simply not evidence. ***Hillhaven Corp. v. State ex rel. Manor Care, Inc.***, 565 S.W.2d 210, 212 (Tenn. 1978) ("Allegations in pleadings are not, of course, evidence of the facts averred. Unless such facts are admitted or stipulated, they must be proved by documents, affidavits, oral testimony or other competent evidence.").

Moreover, absolutely nothing in the record indicates that Ms. Boshers had personal knowledge of the facts alleged in the petition. As the Tennessee Court of Criminal Appeals has observed:

> [A] witness must have the requisite personal knowledge to testify. Tennessee Rule of Evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The "[e]vidence to prove personal knowledge may, but need not, consist of the witness's own testimony." Tenn. R. Evid. 602. "The personal knowledge rule of Rule 602 provides that . . . a witness is not competent to testify about facts unless the witness personally perceived those facts by use of the witness's five senses." Neil P. Cohen, et al., Tennessee Law of Evidence § 602.1 at 2 & 3.

State v. McKenzie, No. E2018-02226-CCA-R3-CD, 2020 WL 3251173, at *3 (Tenn. Crim. App. June 16, 2020), *perm. app. denied* (Tenn. Nov. 16, 2020). Without personal knowledge, I must conclude that Ms. Boshers' testimony does not provide competent evidence that Father committed the act alleged in the dependency and neglect petition.

Respectfully, it is unclear from the Majority Opinion whether it is also basing its conclusion on the doctrines of res judicata or collateral estoppel. To be sure, no analysis under either doctrine is undertaken in the Majority Opinion. And DCS does not argue that either of these doctrines is applicable here. But the Majority Opinion does reference the

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birth. Moreover, as discussed *supra*, there is very little evidence of Father's bad conduct at any point.

order entered in the dependency and neglect petition. To the extent that the majority is relying on this prior finding, it is also in error.

As an initial matter, the issue of whether Father committed this conduct is not res judicata. A party attempting to use res judicata "must demonstrate (1) that the underlying judgment was rendered by a court of competent jurisdiction, (2) that the same parties or their privies were involved in both suits, (3) that the same claim or cause of action was asserted in both suits, and (4) that the underlying judgment was final and on the merits." ***Jackson v. Smith,*** 387 S.W.3d 486, 491 (Tenn. 2012) (citing ***Lien v. Couch***, 993 S.W.2d 53, 56 (Tenn. Ct. App. 1998)). While questions of severe abuse are res judicata because they involve identical claims in both the dependency and neglect action and the termination action, *see* ***In re Heaven L.F.***, 311 S.W.3d 435, 439 (Tenn. Ct. App. 2010), the requirement that the same cause of action or identical issues be asserted in both suits is not met here. *Cf.* ***Richardson v. Tennessee Bd. of Dentistry***, 913 S.W.2d 446, 459 (Tenn. 1995) (citing ***Scales v. Scales***, 564 S.W.2d 667, 670 (Tenn. Ct. App. 1977)) (requiring the party raising res judicata to demonstrate that "both cases involve the same parties, the same cause of action, or identical issues"). Specifically, the dependency and neglect petition did not involve the claim that Father committed abandonment by wanton disregard. *See* ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987) ("The doctrine of res judicata bars a second suit between the same parties or their privies on the *same cause of action* with respect to all issues which were or could have been litigated in the former suit.") (emphasis added). Because neither the issues nor the causes of action were identical, res judicata is simply inapplicable here.

Collateral estoppel is also no help to DCS. Unlike res judicata, which applies to all issues that "were or could have been litigated" so long as they involve the same cause of action or identical issues, collateral estoppel "operates to bar a second suit between the same parties and their privies on a different cause of action only as to issues which were *actually litigated and determined* in the former suit." ***Id.*** (emphasis added). But the issue of whether Father actually committed the facts alleged in the petition was not actually litigated and determined in the dependency and neglect action. Instead, the juvenile court's order in the dependency and neglect proceeding states as follows: "Father makes no stipulation as to the allegations in the petition being true or false. But will make a best interest stipulation as to the child's [dependency and neglect] and factually, admits he is currently incarcerated." Thus, the only finding made in the dependency and neglect order was that the child was dependent and neglected due to Father's current incarceration. The question of whether Father committed the act alleged in the petition of dangling the child by his feet was not determined, and therefore Father is not collaterally estopped from disputing it.

The burden in this case was on DCS to prove at least one ground for termination through clear and convincing evidence. The clear and convincing evidence standard defies precise definition, ***Majors v. Smith***, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989), but has

been described as a "high evidentiary burden." ***In re Alex B.T.***, No. W2011-00511-COA-R3-PT, 2011 WL 5549757, at *9 (Tenn. Ct. App. Nov. 15, 2011); *see also* ***In re Audrey S.***, 182 S.W.3d 838 (Tenn. Ct. App. 2005) (explaining the need for the "heightened" standard of proof due to the stakes of a termination proceeding being "so profoundly high"); ***Gates v. Williams***, No. E2010-01192-COA-R3-CV, 2011 WL 683935, at *3 (Tenn. Ct. App. Feb. 28, 2011) (describing the clear and convincing standard as a "high burden"). It is more exacting than the "preponderance of the evidence" standard, although it does not demand the certainty required by the "beyond a reasonable doubt" standard. ***In re B.A.C.***, 317 S.W.3d 718, 724 (Tenn. Ct. App. 2009). Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence." ***In re M.J.B.***, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." ***Id.***

The evidence presented in this case simply does not meet this requirement as to demonstrate abandonment by wanton disregard. The Majority Opinion's focus on the fact that Father did not "affirmatively deny" the allegations contained in the dependency and neglect petition is misguided. The burden of establishing the grounds is on the party seeking termination, and never shifts to the parent. *See* ***In re Dustin T., et al.***, No. E2016-00527-COA-R3-PT, 2016 WL 6803226, at *18 (Tenn. Ct. App. Nov. 17, 2016) (Stafford, J., dissenting). Father's failure to deny the allegations is not affirmative proof that they occurred. Indeed, to come to that conclusion would be directly contrary to the Majority Opinion's prior holding regarding the effect of Father's invocation of the Fifth Amendment privilege and the need for corroborating evidence in order for a negative inference to be drawn. *See generally* ***Akers v. Prime Succession of Tennessee, Inc.***, 387 S.W.3d 495, 506 (Tenn. 2012). Thus, I must conclude that DCS failed to present any competent proof that Father committed this incident of bad conduct. Because this single incident appears to be the sole basis for the majority's affirmance of the ground of abandonment by wanton disregard, I cannot agree with their conclusion that the ground was proven by clear and convincing evidence. As a result, I must conclude that DCS failed to prove even a single ground to terminate Father's parental rights.

If it is true that Father committed the heinous acts alleged by DCS, DCS has failed to submit competent proof to support its allegations. But DCS cannot mitigate its failure by drafting an order that is not an accurate reflection of the proof presented. *See generally* ***In re Colton B.***, No. M2017-00997-COA-R3-PT, 2017 WL 6550620, at *3 (Tenn. Ct. App. Dec. 22, 2017) (holding that orders in termination proceedings must be an accurate reflection of the trial court's judgment). And this Court simply cannot litigate DCS's case for it. Nor can we save DCS from the effects of its own failures through a legal analysis that lacks legal and factual support in an effort to reach a perceived correct result. In this case, it was not only the party-prepared order, but also the proof that was deficient. As a result, I believe that the only proper disposition is to reverse the judgment of the trial court

and remand for the dismissal of DCS's petition. *Cf.* ***id.*** at *5 (vacating, rather than reversing, where the record reflected that evidence was presented but the party-prepared order entered was not proper).

For these reasons, I must respectfully dissent from my colleagues' decision to affirm the termination of Father's parental rights.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE